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Absent Physical Invasion, Governmental Interference with Private Property Will Not Likely Violate the Fifth Amendment's Takings Clause: *Machipongo Land and Coal Company, Inc. v. Commonwealth of Pennsylvania*

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Absent Physical Invasion, Governmental Interference With Private Property Will Not Likely Violate the Fifth Amendment's Takings Clause: *Machipongo Land and Coal Company, Inc. v. Commonwealth of Pennsylvania*

CONSTITUTIONAL LAW – FIFTH AMENDMENT TAKINGS CLAUSE – Supreme Court of Pennsylvania no longer Recognizes Pennsylvania's use of Three Estates within a Single Parcel of Land by adopting the United States Supreme Court's Vertical Segmentation Rule.

Machipongo Land and Coal Company, Inc. v. Commonwealth of Pennsylvania, 799 A.2d 751 (Pa. 2002)

The Brisbin Recreation Board and the Locust Grove Sportsmen Club desired to have the Goss Run Watershed declared unsuitable for mining ("UFM").[1] The two organizations filed a petition with the Pennsylvania Department of Environmental Protection ("DEP") in May of 1989.[2] The property rights of the Machipongo Land and Coal Co., Inc., the Victor E. Erickson Trust and Joseph Naughton (collectively, "the Property Owners") would be affected if such designation were adopted.[3] The Machipongo Land and Coal Co., Inc. ("Machipongo"), owned 373 acres in fee simple within the UFM area.[4] The Victor E. Erickson Trust ("Erickson") and Joseph Naughton ("Naughton") property was jointly owned and consisted of a coal estate totaling fifty-two acres within the

1. Machipongo Land and Coal Company, Inc. v. Commonwealth of Pennsylvania, 799 A.2d 751, 756 (Pa. 2002) ("Machipongo").

2. *Id.* at 756. On July 1, 1995, the Department of Environmental Resources was renamed to the Department of Environmental Protection. *Id.* at 756 n.1. States are entitled to regulate mining activities if they comply with specific federal requirements. *Id.* at 755. "To be eligible to assume primary regulatory authority . . . each State shall establish a planning process enabling objective decisions based upon competent and scientifically sound data and information as to which, if any, land areas of a State are unsuitable for all or certain types of surface coal mining operations . . .." 30 U.S.C. § 1272(a)(1)(2002).

3. *Id.* Declaring the property UFM has the effect of "prohibiting the mining of coal in a large portion of [the Goss Run] Watershed." *Id.* On January 12, 2000, the Commonwealth Court granted the Property Owners' Motion to Substitute the Erickson Family Trust for Victor E. Erickson Trust. *Id.* at 761.

4. *Id.* Of 573 acres, 373 acres are within the UFM area and 200 are outside. *Id.*

UFM area.[5] Machipongo, Erickson, and Naughton all stipulated that they had used their respective property for purposes other than coal mining.[6] The Environmental Quality Board approved the regulation proposed by the DEP designating the Goss Run Watershed as UFM.[7]

On July 1, 1992, the Property Owners filed a petition for equitable and declaratory relief against the Commonwealth of Pennsylvania, DEP, the Environmental Quality Board, and Arthur Davis, Secretary of Environmental Protection (collectively, "the Commonwealth").[8] Furthermore, the petition asserted that the designation as UFM unconstitutionally took their coal.[9] The Property Owners sought to have the case referred to the Court of Common Pleas of Clearfield County for the determination.[10] In response, the Commonwealth filed a demurrer.[11] On April 15, 1993, the court determined that the regulation was not unconstitutional and that the Environmental Hearing Board should decide if the regulation's application constituted a taking.[12] Both parties

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5. *Id.* at 757. The Erickson/Naughton property in total is comprised of the 52-acre coal estate within the UFM area, a coal estate of 250 acres outside of the UFM area, and a fee simple title to 1,150 acres outside of the UFM area. *Id.* Joseph Naughton has a 1/5 interest and the Victor E. Erickson trust has the remaining 4/5 interest in the jointly owned parcel. *Id.* On December 16, 1994, the beneficiaries of the Victor E. Erickson Trust created the Erickson Family Trust and transferred their interest in the land to this new trust. *Id.*

6. *Machipongo*, 799 A.2d at 757. Specifically, Machipongo stated that the property within the UFM area was additionally used for the sale of timber and for leases for gas development. *Id.* The Erickson and Naughton property owners also used their property for gas development leases. *Id.*

7. *Id.* at 757-58. The DEP conducted a study in conformance with 52 P.S. § 1396.4e which provided that the proposed mining activities would have a detrimental effect on water quality and wild trout populations in Goss Run. *Id.* at 757. The approved regulation read: "'The surface mineable coal reserves within the Goss Run Watershed upstream of the Brisbin Dam, including a small tract of land within the Goss Run Watershed of the West Tributary to Goss Run, a total of approximately 555 acres, are designated unsuitable for all types of surface mining activities.'" *Id.* at 758 (citing 25 PA. CODE § 86.130(h)(14)).

8. Brief on Appeal of Plaintiffs-Appellees Machipongo at 5, *Machipongo Land and Coal Company, Inc. v. Commonwealth of Pennsylvania*, 799 A.2d 751 (Pa. 2002) (No. 119 Pittsburgh 2001).

9. Brief on Appeal of Defendant-Appellants Commonwealth at 7, *Machipongo Land and Coal Company, Inc. v. Commonwealth of Pennsylvania*, 799 A.2d 751 (Pa. 2002) (No. 112 Pittsburgh 2001).

10. *Machipongo*, 799 A.2d at 758.

11. *Id.* In addition to the demurrer, the Commonwealth filed preliminary objections. *Id.* A demurrer is defined as "[a]n allegation of a defendant, which, admitting the matters of fact alleged by complaint or bill to be true, shows that as they are therein set forth they are insufficient for the plaintiff to proceed upon or to oblige the defendant to answer[.]" BLACK'S LAW DICTIONARY 444 (7th ed. 1999).

12. Machipongo Land and Coal Company, Inc. v. Commonwealth of Pennsylvania, 624 A.2d 742, 751-54 (Pa. Cmmw. Ct. 1993) ("Machipongo I"). The court also held that the

appealed to the Supreme Court of Pennsylvania, which reversed, concluding that the Environmental Hearing Board was not the proper forum to decide taking and that the Court of Common Pleas had jurisdiction.[13] On reargument, the Supreme Court vacated the decision that the Court of Common Pleas had jurisdiction and remanded to the Commonwealth Court to determine whether the regulation constituted a taking.[14]

On remand, the Property Owners contested whether the UFM designation of their property was accurate by filing a Petition for Review with the Commonwealth Court.[15] The Commonwealth then moved for summary judgment, which the court denied because issues of fact existed.[16] Prior to trial, the Commonwealth Court entered an order on October 28, 1999, prohibiting the Commonwealth from introducing evidence on the issue of whether the proposed mining activities constitute a public nuisance.[17] On Au-

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Property Owners did not fail to exhaust their administrative remedies. *Id.* at 751. The Commonwealth Court granted, in part, and denied, in part to the Commonwealth's preliminary objections. Brief on Appeal of Defendant-Appellants Commonwealth at 7, *Machipongo Land and Coal Company, Inc. v. Commonwealth of Pennsylvania*, 799 A.2d 751 (Pa. 2002) (No. 112 Pittsburgh 2001).

13. Machipongo Land and Coal Company, Inc. v. Commonwealth of Pennsylvania, 648 A.2d 767, 768-71 (Pa. 1994) ("Machipongo II"). The court also affirmed the Commonwealth Court's holding that the Property Owners were not required to exhaust their administrative remedies. *Id.* at 769.

14. Machipongo Land and Coal Company, Inc. v. Commonwealth of Pennsylvania, 676 A.2d 199, 200 (Pa. 1996) ("Machipongo III"). The basis for the Supreme Court's decision was that the regulation alleged to have taken the Property Owner's coal was adopted under the Commonwealth's police power rather than the Eminent Domain Code. *Id.* at 203. The regulation, thereby, did not fall within any of the exceptions to Section 761(a) of the Judicial Code, 42 Pa. C.S. § 761(a)(1). *Id.* at 202-03.

15. Machipongo Land and Coal Company, Inc. v. Commonwealth of Pennsylvania, 719 A.2d 19, 21 (Pa. Cmmw. Ct. 1998) ("Machipongo IV").

16. *Machipongo*, 799 A.2d at 759-60. Summary judgment is defined as "a procedural device available for prompt and expeditious disposition of controversy without trial when there is no dispute as to either material fact or inferences to be drawn from undisputed facts, or if only question of law is involved." BLACK'S LAW DICTIONARY 1449 (7th ed. 1999). The specific issue of fact was whether the coal estate had any independent value. *Id.* at 760. The court employed the *Lucas* analysis to determine whether there was a taking. *Id.* at 759 (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)). The factors to be considered are:

> [W]hether the public interest requires regulatory interference with the property right; whether the regulation is reasonably related to that goal; whether the amount of property taken deprives an owner of all economical viable uses of the property, measured by what is taken (the numerator) against what was left (the denominator); [and] whether the property owner's actions or proposed actions would cause a nuisance.

Id. The Commonwealth Court determination was such that the coal estates were used as the denominators. *Id.*

17. *Id.* at 761. The Commonwealth could introduce evidence to the extent the Property Owners would be denied a permit to mine coal under the Surface Mining Act or regulations

gust 21, 2000, after trial, the Commonwealth Court ruled that a regulatory taking occurred with regard to the Erickson/Naughton surface reserves and the Machipongo underground reserves.[18] On October 25, 2000, the Commonwealth filed an appeal, and on November 12, 2000, the Property Owners filed a cross-appeal.[19]

The central issue on appeal to the Pennsylvania Supreme Court was whether the taking of a coal estate occurred when the Commonwealth approved the regulation designating some of the Property Owners' land as UFM without providing just compensation to the land owners.[20] The court reversed and remanded finding, in the absence of additional facts, that the regulation did not constitute a taking.[21]

Before addressing the specific inquiry of the case, Justice Newman, writing a unanimous opinion, determined whether a transfer from the Victor E. Erickson Trust to the Erickson Family Trust deprived the Erickson Family Trust of standing to pursue the takings claim.[22] The U.S. Supreme Court has held that standing exists in a regulatory taking claim even though the ownership of the property was transferred after the regulation became effective.[23] The beneficiaries of the Victor E. Erickson Trust voluntarily transferred the trust property, to a newly formed trust, the Erickson Family Trust, on the same day that the transferred property became designated UFM.[24] The Pennsylvania Supreme Court, fol-

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promulgated thereunder. Brief on Appeal of Defendant-Appellants Commonwealth at 9, *Machipongo Land and Coal Company, Inc. v. Commonwealth of Pennsylvania*, 799 A.2d 751 (Pa. 2002) (No. 112 Pittsburgh 2001).

18. Machipongo Land and Coal Co., Inc. v. Commonwealth, No. 248 M.D. 1992, slip op. The Erickson/Naughton surface reserves consisted of 27 acres and the Machipongo underground reserves comprised 96 acres. *Id.* at 38. The 35-acre Machipongo surface reserve was not stricken from the regulation, therefore the Commonwealth Court affirmed in part and reversed in part. *Id.* Final judgment was entered on October 19, 2000. Brief on Appeal of Plaintiffs-Appellees Machipongo at 10, *Machipongo Land and Coal Company, Inc. v. Commonwealth of Pennsylvania*, 799 A.2d 751 (Pa. 2002) (No. 119 Pittsburgh 2001).

19. Brief on Appeal of Plaintiffs-Appellees Machipongo at 10, *Machipongo Land and Coal Company, Inc. v. Commonwealth of Pennsylvania*, 799 A.2d 751 (Pa. 2002) (No. 119 Pittsburgh 2001).

20. *Machipongo*, 799 A.2d at 755.

21. *Id.* at 775-76.

22. *Id.* at 761-62. The Commonwealth argued that Erickson lacked standing because the property transferred from one trust to another with no new beneficiaries on the date the property was designated UFM. *Id.* at 761.

23. *Id.* at 762. The transfer of ownership in *Palazzolo* occurred as a matter of law and the transferred property was from a corporation to an individual after the effective date of the regulation. Palazzolo v. Rhode Island, 533 U.S. 606, 614 (2001).

24. *Id.* at 757. The beneficiaries to the Victor E. Erickson Trust are the same beneficiaries to the Erickson Family Trust. *Id.* The Erickson Family Trust is referred to as ("Erickson").

lowing the U.S. Supreme Court, held that standing to assert a regulatory takings claim exists where property is transferred from one trust to another, with no new beneficiaries, and there was no physical invasion authorized by the regulation.[25]

After determining that the Erickson Family Trust had standing, Justice Newman moved to analyze the problem that arises when the government regulates privately owned property.[26] Specifically, the court addressed the aforementioned issue of whether a coal estate, without payment of just compensation, was a taking when a governmental regulation designated the land as UFM.[27]

The court began its analysis by examining the conundrum, thus far unanswered, of balancing the rights of property owners to use their land as they deem fit versus the government's power to regulate the permissible uses of that property.[28] The Property Owners argued that the regulation, in effect, removed all of the coal on their property, which resulted in a physical invasion.[29] The U.S. Supreme Court has held that a regulatory taking exists when a regulation authorizes physical invasion.[30] However, the majority was not persuaded by the Property Owners' physical invasion argument and determined that no physical invasion occurred, actually or effectually.[31] The court commented that bankruptcy would befall the government if it were required to purchase all of the land whose uses it wanted to regulate.[32] The majority stated that a regulatory taking does not occur simply because the most profitable use of the property is prohibited by law.[33] The court did, however, adopt the standard that when a public burden is borne by a small number of private individuals, the regulation has gone too far and constitutes a taking.[34]

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25. *Machipongo*, 799 A.2d at 762-63.
26. *Id.* at 763.
27. *Id.* at 755, 763.
28. *Id.* at 763.
29. *Id.*
30. *Machipongo*, 799 A.2d at 763 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 422 (1982), which held that a taking occurred because building owners were required to permit cable companies to install cable facilities on their buildings.) "'A taking may more readily be found when the interference with property can be characterized as a physical invasion by government . . ..'" *Id.* (quoting Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).
31. *Id.*
32. *Id.* at 764.
33. *Id.*
34. *Id.* at 765.

Using this standard, Justice Newman discussed the two tests that have been routinely applied by the U.S. Supreme Court in "non-appropriated/non-physical" invasion cases.[35] The tests are utilized in different situations.[36] The *Lucas*[37] analysis is employed when a regulation completely deprives the owner from using the property.[38] The other analysis, the traditional or *Penn Central*[39] analysis, is only applied in situations where the regulation does not completely render the property owner devoid of any uses in such property.[40] Regardless of what analysis is used, the court must determine the size of the parcel and against which parcel the takings analysis will be applied.[41] The court noted that if the area were too narrowly defined, almost any government action would give rise to a taking.[42] Conversely, if the area is broadly defined, almost no government action will be found to be a taking, regardless of degree of physical invasion.[43] Therefore, resolving the denominator problem is paramount in analyzing a takings issue.[44]

Because the parcels in question involved both surface and subsurface reservoirs of coal, the court was required to analyze the issues of horizontal and vertical severance.[45] Justice Newman first examined the vertical severance issue.[46] Pennsylvania courts have routinely permitted vertical severance within a single parcel of land when analyzing a takings issue.[47] The Court looked to three U.S. Supreme Court cases to guide its analysis.[48] In each of the three cases, the argument for a division of estates within a single

35. *Machipongo*, 799 A.2d at 765.
36. *Id.*
37. *Id.* at 765. The *Lucas* analysis is derived from the U.S. Supreme Court case of *Lucas v. South Carolina Coastal Council*. *Lucas*, 505 U.S. 1003 (1992).
38. *Id.*
39. *Id.* The second analysis has been described by the U.S. Supreme Court as an "analysis pursuant to the principles set forth in *Penn Central*." *Id.* (quoting *Palazzolo*, 533 U.S. at 616).
40. *Machipongo*, 799 A.2d at 765.
41. *Id.* at 765. This is commonly referred to as the denominator problem. *Id.*
42. *Id.* at 765-66.
43. *Id.*
44. *Id.* at 766.
45. *Machipongo*, 799 A.2d at 766.
46. *Id.*
47. *Id.*
48. *Id.* at 767-68. The U.S. Supreme Court had expressly rejected vertical severance as employed in Pennsylvania. *Id.* at 766. The court analyzed *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987), *Penn Central*, and *Tahoe-Sierra Preservation Council v. Tahoe Reg. Planning Agency*, 122 S.Ct. 1465 (2002). *Id.* at 768.

parcel of land was presented and subsequently failed.[49] Consequently, the Court followed the U.S. Supreme Court and defined the relevant parcel to include both the surface and mineral rights.[50]

Justice Newman addressed the horizontal segmentation issue next.[51] The Property Owners sought to have only the coal estates within the UFM areas and not all the other land owned by the respective Property Owners used in the determination.[52] The Commonwealth urged the court to adopt the antipodal approach and use all of the Property Owner's land located in Clearfield County.[53] Avoiding the use of a rigid rule, as both parties proposed in differing versions, the court adopted a flexible approach that would provide for factual nuances.[54] The majority identified a number of factors that should be considered in defining a relevant parcel.[55] The list included:

[U]nity and contiguity of ownership[;] the dates of acquisition[;] the extent to which the proposed parcel has been treated as a single unit[;] the extent to which the regulated holding benefits the unregulated holdings; the timing of transfers, if any, in light of the developing regulatory environment; the owner's investment backed-expectations; and, the landowner's plans for development.[56]

The court was unable to identify the appropriate horizontal formulation of the property to be used because the Commonwealth Court did not discuss all of the aforementioned factors, and therefore, they were not part of the record before the court.[57]

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49. *Id.* at 768. The Supreme Court refused vertical severance of a mineral estate in *Keystone*; vertical severance of air and surface rights in *Penn Central*; and temporal division in *Tahoe Sierra*. *Id.*

50. *Machipongo,* 799 A.2d at 768. The courts decision had the effect of overruling the preceding Pennsylvania court cases regarding vertical segmentation. *Id.* Pennsylvania now is in line with the U.S. Supreme Court's vertical segmentation rule. *Id.*

51. *Id.*

52. *Id.* Adopting the Property Owners' view would prove restrictive and unfair to the Commonwealth. *Id.*

53. *Id.* Adopting the Commonwealth's view would prove inclusive and unfair to the Property Owners. *Id.*

54. *Id.*

55. *Machipongo,* 799 A.2d at 768.

56. *Id.* at 768-69. The list is not to be limited to the items mentioned and that all factors are to be given the same level of importance. *Id.*

57. *Id.* at 768. The court remanded to the Commonwealth Court to determine the relevant facts in consideration of the listed factors and to formulate the property to be used in the *Lucas* and *Penn Central* analyses. *Id.*

The majority then applied the *Lucas* analysis to the limited facts presented.[58] Under the *Lucas* analysis, a regulatory taking occurs if the property in question is rendered void of "all economically beneficial or productive use of the land."[59] The court applied the *Lucas* analysis to the Machipongo parcel.[60] The Property Owners argued that because they own coal estates, and that the regulation deprived them of mining coal in the UFM area, the land has no economically beneficial use.[61] The Court determined that selling timber and leasing the property for gas development was sufficient for the Machipongo parcel to be economically beneficial.[62] Therefore, using the *Lucas* analysis, the majority held that no regulatory taking had occurred with regard to the Machipongo land.[63] Justice Newman was unable to determine whether the Erickson/Naughton property passed the *Lucas* analysis because of inconsistent facts.[64]

In analyzing the case based on the *Penn Central* analysis the court was required to consider several factors, specifically, the economic impact on the Property Owners; the character of the governmental action, i.e., physical invasion; and if the regulation promoted general welfare.[65] After considering the factors, the majority attempted to determine if the regulation unfairly oppressed and caused a few people to bear public burdens, which should have been borne by the public as a whole.[66] However, based on the *Penn Central* analysis, there were too few facts present for the court to make a determination.[67]

Lastly, the majority analyzed the issue of nuisance.[68] The court acknowledged that there could be no taking if the regulation prohibited behavior that may also be prohibited by general principles

58. *Id.* at 769.

59. *Id.* at 768. A taking does not occur when private property's use is considered a public nuisance. *Id.*

60. *Machipongo,* 799 A.2d at 768.

61. *Id.*

62. *Id.* at 769. Previously, Pennsylvania courts recognized three different estates on the same parcel: surface, coal/mineral, and support. *Id.* This court overruled recognizing three distinct estates and now treats each individual parcel as one estate. *Id.*

63. *Id.* at 770.

64. *Id.* The court remanded to the Commonwealth Court with regard to the Erickson/Naughton property to gather additional facts, *i.e.*, whether they owned surface rights inside the UFM area and to determine the extent of the horizontal estate. *Id.*

65. *Machipongo,* 799 A.2d at 770.

66. *Id.*

67. *Id.* The court remanded to the Commonwealth Court to determine whether the regulation constituted a taking pursuant to the *Penn Central* analysis. *Id.*

68. *Id.* at 771.

of state property law.[69] Pennsylvania courts have applied Section 821B of the Restatement (Second) of Torts in cases to determine if a public nuisance is present during a particular use of property.[70] As a result, the court noted that the crucial issue is whether the Property Owners' proposed mining activities "would unreasonably interfere with a right of the general public."[71] Additionally, the majority noted that it is unlawful and a nuisance to pollute public waters.[72] According to the court, the Commonwealth will prevail if the proposed mining would impede the public right to unpolluted water.[73] Ultimately, the court left this question to be decided by the Commonwealth Court.[74]

The Property Owners averred that the court had formerly applied a nuisance *per se* rule which would cause the Commonwealth to show that the occurrence of the nuisance in question was "practically certain, not merely probable."[75] Justice Newman identified

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69. *Id.* at 772. See also *Lucas*, 505 U.S. at 1027-29.

70. *Machipongo,* 799 A.2d at 772. RESTATEMENT (SECOND) OF TORTS Section 821B provides:

> (1) A public nuisance is an unreasonable interference with a right common to the general public. (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following: (a) [w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Id.

71. *Id.* at 773.

72. *Id.* at 774. Section 401 of the Clean Streams Law provides in pertinent part:

> "It shall be unlawful for any person ... to place into any of the waters of the Commonwealth ...any substance ... resulting in pollution[.] Any such discharge is hereby declared to be a nuisance." 35 P.S. § 691.401. Pollution is defined as "contamination of any waters of the Commonwealth such as will create or is likely to create a nuisance or to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, municipal, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, including but not limited to such contamination by alteration of the physical, chemical or biological properties of such waters, or change in temperature, taste, color or odor thereof, or the discharge of any liquid, gaseous, radioactive, solid or other substances into such waters . . .."

Machipongo, 799 A.2d at 773-74 (quoting 35 P.S. § 691.1).

73. *Id.*

74. *Id.* at 775. The Commonwealth Court held that no authority permitted the Commonwealth to prohibit the Property Owners from mining, and, therefore refused the Commonwealth from admitting into evidence regarding the Property Owners' proposed mining use and the possibility that the use would result in a nuisance. *Id.* at 772. This was in error according to Justice Newman, and as a result, the issue of nuisance was remanded to the Commonwealth Court for a determination. *Id.* at 775.

75. *Machipongo,* 799 A.2d at 774.

that the crux to protecting the public waters is prevention, a proactive rather than a retroactive approach.[76] In light of the past decisions, and in adherence to growing environmental awareness and concern, the court dismissed the nuisance *per se* requirement.[77] The majority, in considering all that was asserted, held that the Commonwealth Court erred in determining that a taking occurred.[78]

The question of whether governmental action constitutes a regulatory taking of private property has been confused and rendered more difficult to answer through the years.[79] Pennsylvania was unique in that three estates in land were recognized: the mineral estate, the surface estate, and the support estate.[80] The earliest known case to identify the surface support estate was the 1870 case of *Jones v. Wagner*.[81] The Supreme Court of Pennsylvania

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76. *Id.*

77. *Id.* at 775. The Commonwealth had a technical study performed that revealed a "high potential to cause increases in dissolved solid and metal concentrations in Goss Run that would adversely affect the use of the stream as an auxiliary water supply ... and destroying the habitat for wild trout populations." *Id.* (quoting *Machipongo VI*, 719 A.2d at 21).

78. *Id.* The court also held that the Erickson Family Trust had standing. *Id.* Additionally, the court remanded the issue to the Commonwealth Court for a determination on the horizontal boundaries of the relevant property; to apply the *Lucas* analysis to the Erickson/Naughton parcel; and to apply the *Penn Central* analysis to the land of both Property Owners. *Id.* at 762-63,775. Furthermore, the court specified that if there is a taking, under either analysis, the Commonwealth Court is to determine whether a nuisance or other state property law would prohibit the proposed mining of the property. *Id.* at 775.

79. 1 Pub. Nat. Resources L. § 4:5 (2002). The takings clause in the Pennsylvania Constitution provides that "private property [shall not] be taken or applied to public use, without authority of law and without just compensation being first made or secured." PA. CONST. art. I, § 10. Similarly, the United States Constitution in pertinent part states that "[n]o person . . . shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. According to *United Artists' Theater Circuit, Inc., v. City of Philadelphia*, Pennsylvania's "case law reveals that [the Supreme Court of Pennsylvania] has continually turned to federal precedent for guidance in its taking jurisprudence, and indeed has adopted the analysis used by the federal courts." 635 A.2d 612,616 (1993). Therefore, decisions of both the United States Supreme Court and the Supreme Court of Pennsylvania will be examined together.

80. *Machipongo*, 799 A.2d at 769.

81. Jones v. Wagner, 66 Pa. 429, 433 (Pa. 1870). The facts of *Wagner* were as follows: [Wagner] was possessed of a piece of land containing 4 acres, and that [Jones] removed the coal underlying the tract in 'so negligent, careless and unskillful a manner, and without leaving proper pillars, ribs and supports,' that the surface caved in, greatly damaging the land, the dwelling-house and other buildings, the fences and fruit trees, and prevented [Wagner] from having the full benefit and enjoyment thereof[.] ... The land of [Wagner] was part of a tract called Bergen-op-Zoon, late of the estate of John Ormsby, deceased. By proceedings in partition in October 1855, the coal was severed from the surface: the surface, of which [Wagner's] land [was] a part, was allotted to the children of Sidney Gregg, and the coal purport underlying 75

recognized that more than a mere contract right was involved when it said: "Contract may devote the whole minerals to the enjoyment of the purchaser, without supports, if the parties choose. If not, the loss by maintaining pillars or putting in props will necessarily come out of the value of the mineral estate."[82] The Court held that the mining right was servient to the surface to the extent of sufficient supports to sustain it, and that there could be no custom to the contrary.[83] The *Wagner* Court concluded that the business of mining in the western part of the state was of a date too recent to give such a custom the age necessary for its validity.[84]

The first case in which the Supreme Court of Pennsylvania directly addressed the issue of taking was *Commonwealth v. Charity Hospital of Pittsburgh*.[85] *Charity* involved two regulations that prevented the property owner from constructing a hospital.[86] The first act required approval by the mayor, the director of public charity, and the director of public works, or a majority of them before constructing a hospital.[87] The second act prohibited the construction of additional hospitals.[88] The owner argued that use of the property was deprived by the regulations, begetting a regulatory taking of the property.[89] A regulatory taking had not occurred, according to the *Charity* Court, which held that the owner's regulatory taking claim was found wanting because the

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acres of the Greggs' allotment was allotted to Christian Ihmsen. By subsequent transmissions, Ihmsen's coal estate vested in [Jones], October 18th 1856, and 4 acres of the estate of the Greggs became vested in [Wagner] on the 7th of July 1866.

Id. at 433.

82. *Wagner*, 66 Pa. at 435.

83. *Id.*

84. *Id.* at 435.

85. 47 A. 980 (Pa. 1901). The United States Supreme Court addressed the issue of a regulatory taking in 1887 for the first time in the case of *Mugler v. Kansas*. 123 U.S. 623 (1887). In *Mugler*, the Court dismissed the owner's argument and determined that prohibition upon the use of property for purposes declared by valid legislation to be injurious to public health, did not effect a taking. *Mugler*, 123 U.S. at 668. Were the owner to lawfully use his property, the Court reasoned that such use was not impaired by the regulation and that such regulation was merely a declaration by the state that using private property for certain forbidden purposes was prejudicial to the public interests. *Mugler*, 123 U.S. at 669. "If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer." *Mugler*, 123 U.S. at 670 (quoting Beer Co. v. Massachusetts, 97 U.S. 25, 32 (1877)).

86. *Charity*, 47 A. at 981.

87. *Id.*

88. *Id.* The purpose of the act was for the protection of the public health. *Id.*

89. *Id.* at 982.

purpose of the regulations was for the protection of public health.[90] The Court awarded no damages because "the public right [was] invaded."[91]

The next case to advance the concept of regulatory taking was heard 21 years after *Charity*. In *Pennsylvania Coal Co. v. Mahon*,[92] the United States Supreme Court addressed the issue of governmental taking of private property through state enacted laws.[93] Specifically, the Court considered whether Pennsylvania could forbid underground coal mining operations that would cause the subsidence of private structures and public amenities on the surface.[94] The *Mahon* Court equated the property right to subsurface coal with the right to mine it.[95] The Supreme Court found that, for a regulatory taking claim to prevail, the proponent of such claim must show that the legislation exceeded the limits of the police power.[96] In other words, the general rule is that private property may be regulated; however, if such regulation goes too far, a regulatory taking will be avowed.[97] The Court offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment.[98]

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90. *Id.* at 984. The court placed limitations on the legislature by stating that the legislature is not entitled to do whatever it desires by merely declaring that the purpose of the regulation is the protection of the public health. *Id.*

91. *Charity*, 47 A. at 984 (citing Commonwealth v. Pittsburgh & Connellsville R. R. Co., 24 Pa. 159, 160 (1855).

92. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

93. *Mahon*, 260 U.S. at 413. The statute interdicted the mining of coal if such activity would threaten a human dwelling. *Id.* Section 1 of the Kohler Act provides in pertinent part that it shall be unlawful "so to conduct the operation of mining anthracite coal as to cause the caving-in, collapse, or subsidence of ... (d) Any dwelling or other structure used as a human habitation[.]" Mahon v. Pennsylvania Coal Co., 118 A. 491, 492 (1922), *rev'd* 260 U.S. 393 (1922).

94. *Id.* at 412. The Supreme Court of Pennsylvania held that there had been a taking. *Id.* The statute abrogated the existing property rights and contracts that existed prior to the enactment of the statute. *Id.* at 415.

95. *Id.* at 415.

96. *Id.* The Court did not clearly identify when legislation goes "too far." *Id.*

97. *Id.* at 415. The Court offered some assistance as to what is "too far" by stating that "[i]t may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go--and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle." *Id.* at 415-16. While to some extent property may be regulated under the police power, there comes a point where regulation of property may constitute a taking of the property. *Id.*

98. *Mahon*, 260 U.S. at 415. The dividing line between a regulation and a taking was shadowy and difficult to draw or delineate. *Id.*

Applying the newly stated rule, the Court found that the legislation went too far.[99] Diminution in value was identified as one factor to consider when determining if legislation has gone too far.[100] The *Mahon* Court cautioned that the means utilized to achieve the ends in previous cases bypassed the U.S. Constitution in that the government failed to provide just compensation for the liberties and rights it had taken.[101]

In the 1959 case of *Schuster v. Pennsylvania Turnpike Commission*,[102] the Supreme Court of Pennsylvania addressed the issue of whether an oral contract to mine coal from a condemned parcel was sufficient to create an interest in a mining and surface estate subject to just compensation.[103] The three estates were divided in August 1953, when the owner of the parcel in fee entered into an oral agreement with the Schusters, which granted the Schusters the right to mine and remove coal from an area comprising 65 acres.[104] When the commission condemned the land, Schusters were conducting mining operations.[105]

In determining the property rights of the involved parties, the Court ruled that the mineral rights had been separated from the other estates.[106] Therefore, the Schusters had a property interest, the extent to which was determined by the Court to include a por-

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99. *Id.* The United States Supreme Court overruled the Supreme Court of Pennsylvania in its decision. *Id.* at 416.

100. *Id.* at 416. For determining the value of the property, the Court used the parcel in its entirety without expressly stated that it had. *Id.* Four questions were derived from *Mahon*:

(1) What is the nature of the harm caused by the owner's use of the property and the manner of causing that harm?

(2) What is the nature or character of the "taking" or "regulation"?

(3) What is the magnitude of the "taking" or extent of interference with the property interest?

(4) What is the extent of the public interest being protected?

Gaebel v. Thornbury Tp., Delaware County, 303 A.2d 57, 63 (Pa. Cmmw. Ct. 1973).

101. *Id.* The previous trend was to improve public health at the expense of the individual. *Id.* Additionally, the Court stated the maxim that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Id.* at 413. Resolving the issue on grounds of public health, the *Mahon* Court never addressed Pennsylvania's method of separating a particular parcel of land into three separate estates, therefore the law remained intact.

102. 149 A.2d 447 (1959).

103. *Schuster*, 149 A.2d at 450. The regulation complained of in *Schuster* was the Pennsylvania Turnpike Northeastern Extension Act which empowered the commission to condemn "any lands, interest in lands, property rights, rights of way, franchises, easements and other property ...." *Id.*

104. *Id.* at 449. Moffat, the owner of the land in question, had the duty to ensure that the support estate was sufficient for the turnpike. *Id.* at 450.

105. *Id.* at n.4.

106. *Id.* at 450-51.

tion of the surface estate.[107] The Court reasoned that in order to mine coal upon a particular parcel of land, the holder of the mining estate had the right to use the surface estate as was necessary to conduct the mining activities.[108] According to the *Schuster* Court, the Schusters, by way of the oral agreement, also procured the surface estate to the extent necessary for their mining operations.[109]

In *Penn Central Transportation Company v. New York City*,[110] the U.S. Supreme Court addressed the issue of whether a city could place restrictions on the development of landmarks without effecting a taking which required payment of just compensation.[111] In *Penn Central*, a building owner sought to have an office building constructed over a designated landmark.[112] When the New York City Landmarks Preservation Commission refused to approve the landowner's plans, pursuant to New York City's Landmarks Preservation Law, he argued that law, in effect, had taken his property without just compensation and deprived him of it without due process.[113]

The landowner argued that the airspace above his parcel was a valuable property interest, urging that any gainful use of their "air rights" above the parcel had been deprived by the regulation, and that, irrespective of the value of the remainder of their parcel, the rights to the airspace had been taken by the regulation.[114] The *Penn Central* Court rejected the argument that the air rights above the parcel constituted a separate segment of property for takings purposes.[115] In determining *Penn Central*, the Court noted factors to consider in determining whether a regulation was unduly oppressive, therefore, constituting a taking.[116] The amalgam

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107. *Id.* at 454.

108. *Schuster*, 149 A.2d at 454.

> One who has the exclusive right to mine coal upon a tract of land has the right of possession even as against the owner of the soil, so far as it is necessary to carry on his mining operations ... As against an intruder ... we will presume that the possession of the soil was requisite, in order to enable the plaintiffs to avail themselves of their mining privileges.

Id. at 453 (quoting Turner v. Reynolds, 23 Pa. 199, 206 (1854)).

109. *Id.* at 453-54.

110. 438 U.S. 104 (1978).

111. *Penn Central*, 438 U.S. at 107.

112. *Id.* at 116.

113. *Id.*

114. *Id.* at 130. The owner was attempting to expand the three-estate theory to include an "airspace" estate. *Id.*

115. *Id.* at 130.

116. *Penn Central*, 438 U.S. at 124-25.

of factors imposed by the Court included "the regulation's economic effect on the landowner, the extent to which the regulation interfere[d] with reasonable investment-backed expectations, and the character of the government action."[117] The *Penn Central* Court was the first to note the importance of defining what parcel of land was to be used in determining whether the value of the parcel was impacted by the regulation.[118] The parcel in its entirety had been designated as the defining parcel.[119] Employing the elements to the facts in *Penn Central*, the Court concluded that the regulation did not constitute a taking and did not deprive the owner of his due process rights secured in the Fifth Amendment of the U.S. Constitution.[120]

In 1980, the Supreme Court of Pennsylvania expressly adopted the analysis set forth in *Penn Central* for determining unduly oppressive regulations.[121] The Court, in *National Wood Preservers, Inc. v. Commonwealth of Pennsylvania Department of Environmental Resources*, addressed the issue of whether a regulation, the Clean Streams Law, designed to remedy water pollution, exceeded the Legislature's police power and constituted a taking.[122] National Wood Preserves, Inc., a wood preservative business, leased the subject property.[123] In its wood preserving operations, the landowner used pentachlorophenol, a substance lethal to aquatic organisms, and disposed of waste liquids containing this substance into wells on the property.[124] The wells, in turn, drained into the groundwater.[125] Responding to complaints, the Pennsylvania Department of Environmental Resources ("DER") investigated an oily substance in a nearby stream.[126] The substance was

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117. *Palazzolo*, 121 S.Ct. at 2457 (citing *Penn Central*, 438 U.S. at 124).

118. *Penn Central*, 438 U.S. at 130.

119. *Id.* at 130-31.

120. *Id.* at 152-153. The Court reasoned that the parcel was not economically devalued sufficiently to warrant just compensation. *Id.*

121. National Wood Preservers, Inc. v. Commonwealth of Pennsylvania Dep't. of Envtl. Resources, 414 A.2d 37, 45 (1980), *appeal dismissed*, National Wood Preservers. Inc. v. Pennsylvania Dep't. of Envtl. Resources, 449 U.S. 803 (1980).

122. *National Wood*, 414 A.2d at 38-39. In pertinent part Section 316 of the Clean Streams Law provides: "Whenever the [Department of Environmental Resources] finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the [Department] may order the landowner or occupier to correct the condition in a manner satisfactory to the [Department] . . .." *Id.* (quoting 35 P.S. § 691.316).

123. *Id.* at 39.

124. *Id.*

125. *Id.*

126. *Id.* at 39.

pentachlorophenol and fuel oil.[127] Pursuant to the Clean Streams Law, the DER ordered the landowner to abate its polluting activities.[128]

The landowner argued, *inter alia*, that the Clean Streams Law was an impermissible exercise of police power that violated both the United States and Pennsylvania constitutions.[129] In analyzing the validity of the statute, the Court began by noting that there is a strong presumption that Legislature enactments are constitutional and the challenger of the constitutionality of an act of assembly carries a heavy burden of proof.[130] Ultimately, the Court relied on the test set forth in *Lawton v. Steele*.[131] In the *Lawton* test, a statute was not in violation of the United States Constitution if the interests of the public required the interference, the means were reasonably necessary to accomplish the purpose, and the statute did not unduly oppress individuals.[132] The *National* Court refined the taking analysis to include a two-part analysis of the "unduly oppressive" element of the test.[133] Applying the test to the facts in *National*, the Court determined that no violation occurred, under either the Pennsylvania or the United States Constitution.[134]

In 1987, the U.S. Supreme Court came dangerously close to overruling the holding in *Mahon*.[135] In *Keystone Bituminous Coal Association v. DeBenedictis*,[136] the U.S. Supreme Court was faced with facts nearly indistinguishable from those of *Mahon*.[137] In *Keystone*, the Court dealt with an act that again prohibited certain mining practices that through subsidence could cause extensive

127. *National Wood*, 414 A.2d at 39.
128. *Id.*
129. *Id.* at 42.
130. *Id.* at 44.
131. *Id.* at 43 (citing Lawton v. Steele, 152 U.S. 133, 137 (1894)).
132. *National Wood*, 414 A.2d at 44-45. The Court noted that Pennsylvania adopted the *Lawton* test to assess Pennsylvania legislation under the Pennsylvania Constitution in *Commonwealth v. Harmar Coal Co.*, 452 Pa. 77 (1973). *Id.* at 43-44.
133. *Id.* at 45.
134. *Id.* at 45-46. The Court stated that (1) the interests of the public required the interference, (2) the means were reasonably necessary to accomplish the purpose, and (3) the statute did not unduly oppress individuals. *Id.*
135. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 507 (1987) (Rehnquist, J., dissenting).
136. *Keystone*, 480 U.S. 470.
137. *Id.* at 473-74. The act challenged in Keystone was enacted by the Pennsylvania legislature and that forbid the removal of coal beneath structures in excess of 50%. *Id.* at 476-77.

surface damage.[138] However, Justice Stevens, writing for the majority, distinguished *Mahon* on the grounds that the issue in *Keystone* was to the facial validity of the state law, not its individual application.[139] He further stated that the act promoted public purposes, not private as in *Mahon*.[140] Justice Stevens added that the new law did not make profitable coal operations impossible as the law in *Mahon* had.[141]

The Court noted that two key elements, used to determine the presence or absence of a taking, were whether the regulation substantially advanced legitimate state interests, or denied an owner of economically viable use of his land.[142] According to the *Keystone* Court, no taking had occurred.[143] The Court reasoned that the regulation served important public interests.[144] Following *Penn Central*, the Court defined the parcel to include the entire parcel; therefore, the devaluation of one aspect of the property did not deny the owner of other economically viable uses.[145]

In *Lucas v. South Carolina Coastal Council*,[146] the United States Supreme Court addressed the issue whether a regulation that completely deprives the owner of all use of a subject parcel effected a taking requiring just compensation.[147] In *Lucas*, a landowner purchased two beachfront lots intending to erect two dwellings.[148] Two years after the purchase, the South Carolina Legislature enacted a statute that prohibited the landowner from erect-

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138. *Id.* at 474. "Coal mine subsidence is the lowering of strata overlying a coal mine, including the land surface, caused by the extraction of underground coal." *Id.*

139. *Id.* at 484.

140. *Id.*

141. *Keystone*, 480 U.S. at 485. Justice Rehnquist's dissent disputed each of the aforementioned distinctions. *Id.* at 509-10 (Rehnquist, J. dissenting).

142. *Id.* at 485.

143. *Id.*

144. *Id.* The regulation did not "merely involve a balancing of the private economic interests of coal companies against the private interests of the surface owners." *Id.*

> [D]etermination that governmental action constitutes a taking, is, in essence, a determination that the public, rather than a single owner, must bear the burden of an exercise of state power in the public interest," and [the Court] recognized that this question "necessarily requires a weighing of private and public interests.

Id. at 492 (quoting Agins v. Tiburon, 447 U.S. 255, 260-61 (1980)).

145. *Id.* at 497. The Court further noted that the parcel consisted of a "bundle of rights" and the removal of "one strand of the bundle [was] not a taking because the aggregate [had been] be viewed in its entirety." *Id.* (quoting Andrus v. Allard, 444 U.S. 51, 65-66 (1979)). Using this reasoning, the Court held that leaving coal in the ground was not a taking because the mining estate was not a separate segment of property to be used in defining the parcel. *Id.* at 498.

146. 505 U.S. 1003 (1992).

147. *Lucas*, 505 U.S. at 1007.

148. *Id.* at 1006-07.

ing the two dwellings.[149] The Court advanced the takings analysis by establishing a categorical rule in stating that "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use . . . it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[150] In simpler terms, if a regulation deprived a landowner of "all economically beneficial use" of the subject property, the regulation was determined to have effected a takings claim.[151] However, the Court continued, in the event the desired use was prohibited by state property law, no taking will be found.[152] Because the landowners proposed use would not have been in violation of any South Carolina property law, the Court determined that the 1988 statute completely deprived the owner of all use of his parcel.[153]

In *United Artists' Theater Circuit v. City of Philadelphia*,[154] the Supreme Court of Pennsylvania noted that it had adopted the analysis used by the federal courts.[155] After identifying the governing case law, the Court stated the law in Pennsylvania for determining whether state or governmental action constituted a taking.[156] In *United Artists'*, the Historical Commission enacted an ordinance that authorized the historic designation of private property without the consent of the owner.[157] The Court, in applying the law to the facts in *United Artists'*, determined that the "citi-

149. *Id.* at 1007.

150. *Id.* at 1027. After identifying the case law, the Court set forth a clear and concise rule for situations involving non-appropriation/non-physical invasions. *Id.* The *Machipongo* Court provided the following:

> This rule stands for the proposition that regulations that deprive an owner of "all economically beneficial or productive use of land" are takings unless the use constitutes a public nuisance or are caused by the nature of the use and the owner could have expected that the government might prohibit it.

Machipongo, 799 A.2d at 769 (citing *Lucas*, 505 U.S. at 1027-1029).

151. *Id.*

152. *Lucas*, 505 U.S. at 1027.

153. *Id.* at 1032. The case was remanded for the determination of damages. *Id.*

154. 635 A.2d 612 (1993).

155. *United Artists'*, 635 A.2d. at 616. In support the Court cited *Best v. Zoning Board of Adjustment*, 141 A.2d 606 (Pa. 1958); *Burlington and Quincy Railway Co. v. Illinois*, 200 U.S. 561 (1906); and *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). *Id.*

156. *Id.* at 618. According to the Court just compensation was not required where the interest of the general public, rather than a particular class of persons, required governmental action; the means were necessary to effectuate that purpose; the means were not unduly oppressive upon the property holder, considering the economic impact of the regulation, and the extent to which the government physically intrudes upon the property. *Id.*

157. *Id.* at 614.

zens of Pennsylvania empowered the Commonwealth to act in areas of purely historic concern reflecting a general public interest in preserving historic landmarks which requires this type of legislation."[158] The landowner argued that the Historical Commission should purchase the properties it sought to protect.[159] Citing *Penn Central*, the Court dismissed the landowner's assertion on the basis that it would have created a great public burden in the form of a reduced tax base and the public budget would have been decreased due to acquisitions and maintenance costs.[160] The Court concluded that there were no other "practical" means that could be employed to achieve the preservation of historical landmarks.[161] Finally, the Court determined that the regulation could deprive the landowner of the most profitable use of the subject property; however, the Court found that the property had not been rendered void of all profitable uses and that no physical invasion had occurred.[162] Accordingly, the Court determined that no taking had occurred and the regulation did not violate either the United States Constitution or the Pennsylvania Constitution.[163]

Five years after its decision in *United*, and four years before its decision in *Machipongo*, the Supreme Court of Pennsylvania again considered the question of when a regulation limiting private property use affects a taking in *Miller & Son Paving, Inc. v. Plumstead Township*.[164] Although a regulation deprived the landowner of the use of the property for quarrying, the *Miller* Court held other viable uses clearly existed.[165] As a result, the court found that a taking had not occurred.[166] The Court relied on its decision in *United* and concluded that in the absence of all economically beneficial uses of a parcel, no taking will be found.[167]

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158. *Id.* at 618. Therefore, the first element of the test is met. *Id.*

159. *Id.*

160. *United Artists*, 635 A.2d at 618 (citing *Penn Central*, 438 U.S. at 109 n.6). As a result, the second element is met. *Id.*

161. *Id.*

162. *Id.* at 618-19. (citing Andress v. Zoning Board of Adjustment of the City of Philadelphia, 188 A.2d 709, 715 (Pa. 1963); and Best v. Zoning Board of Adjustment of the City of Philadelphia, 141 A.2d 606, 613 (Pa. 1958)).

163. *Id.* at 620. In the fifteen years since *Penn Central*, no other jurisdiction has ruled that a regulation for designating a building as historic was in violation of either the United States Constitution or the state's constitution. *Id.* at 619.

164. 717 A.2d 483 (Pa. 1998), *cert. denied*, 525 U.S. 1121 (1999).

165. *Miller*, 717 A.2d at 486.

166. *Id.* at 487.

167. *Id.* at 486.

The Supreme Court of Pennsylvania's view of when a taking arises was nearly identical to that of the United States Supreme Court and other federal courts prior to *Machipongo*. The only notable exception was that of a parcel having three-estates. Since *Jones*, there have been drastic alterations in the way the Supreme Court of Pennsylvania has examined the Fifth Amendment's takings clause. In *Jones*, the majority concluded that a parcel of property had three separate and distinct estates.[168] With the exception of the three estates recognized in *Jones*, the Supreme Court of Pennsylvania steadily moved toward the United States Supreme Court method of analyzing a taking of private property issue. This asymmetry in defining the estate that existed between the United States Supreme Court and Pennsylvania courts ended with the decision of the Supreme Court of Pennsylvania in *Machipongo*.[169]

In any event, it is difficult not to argue with the result of *Machipongo*. Recognizing three distinct segments within a parcel of land provided for an optimal balance in determining the presence or absence of a taking when different parties owned or operated the different estates. Of benefit, the holding in *Machipongo* cleared up the vagueness associated with Fifth Amendment takings issues in Pennsylvania. However, this clarity is to the detriment of the property owner or operator. In the absence of physical invasion, a taking will only occur where the subject parcel is rendered void of all economically viable uses, where the regulation is not reasonably related to the promotion of general welfare, and public health is not promoted by the prohibition.[170] Thus, on rare occasions will courts find a taking.

The stance taken by the Supreme Court of Pennsylvania in *Machipongo* should also not be shocking considering the United States Supreme Court expressly rejected Pennsylvania's three estate recognition.[171] As the Court itself seemed to recognize, this

168. *Jones*, 66 Pa. at 434. The three estates were surface, mineral, and support. *Id.*

169. If the parcel of property were defined broadly, no government action would ever be considered a taking. *Machipongo*, 799 A.2d at 765. In contrast, if the same parcel was defined with a narrow vertical denominator, almost any government action could be considered a taking. *Id.*

170. *Machipongo*, 799 A.2d at 771.

171. *Keystone*, 480 U.S. at 479-80. The Keystone Court commented that its takings jurisprudence foreclosed "reliance on such legalistic distinctions within a bundle of property rights." *Id.*

is the strongest footing on which the decision stands.[172] In fact, the Court never addressed the consequences of using the three-estate method and repeatedly cited to United State Supreme Court cases for its determination. The holding in *Machipongo* provides little guidance for future litigation. The Court has opted not to extend the "property as a whole" rule to all property. It will likely be limited to those situations where the parcel is owned in fee simple. Therefore, *Machipongo* will be easily distinguishable when a future case presents facts where different parties own or operate the different estates. Until then, the affect of *Machipongo* will be that of having a broadly defined parcel and almost no government action will be considered a taking.

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172. *Machipongo*, 799 A.2d at 766. The Court indicated in the first paragraph of its parcel definition discussion that: "Pennsylvania property law is apparently unique in regarding the support estate as a separate interest in land that can be conveyed apart form either the mineral estate or the surface estate." *Id.* (citing *Keystone*, 480 U.S. at 500).